No. 89-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE TRAVELERS INDEMNITY COMPANY,
Petitioner,

—v.—

AVONDALE INDUSTRIES, INC. and
OGDEN CORPORATION,
Plaintiffs-Respondents,

—and—

COMMERCIAL UNION INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY,
Third-Party-Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the courts below err in determining that a decision awarding plaintiff relief under a separate claim can be made final under Rule 54(b) while defendant's claims for contribution and indemnity, asserted in a third-party pleading, remained unresolved (due to defendant's failure to take any action to secure their resolution)?

2. Did the Court of Appeals err in determining that the District Court did not abuse its discretion in entering a Rule 54(b) judgment when a decision of an intermediate state court, which the district court correctly held was distinguishable, was still subject to review by the highest state court?

RULE 29.1 STATEMENT

Ogden Corporation owns an interest in the following subsidiaries (excluding wholly owned subsidiaries):

Company name	*% Ownership*
Rototest Laboratories, Inc.	91%
ERC Environmental and Energy Services Co., Inc.	68.6%
IEA of Japan Company Ltd.	50%
IEAL Energie Consult GmbH	50%
Laser Corporation of America	49.96%
Lawrence Associates, Inc.	80%
Ogden Catering of Texas, Inc.	48%
Ogden Bulk Systems Company, Inc.	90%
International Terminal Operating Co. Inc.	50%
Ogden Projects, Inc.	85.6%

Neither Ogden nor Avondale Industries, Inc. has any parent companies, and Avondale has no non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner, The Travelers Indemnity Company, insured Respondents Ogden Corporation and Avondale Industries,

Inc., under comprehensive general liability insurance policies covering the period 1975-1984. In the policies, Travelers undertook to "defend any suit against the insured."

The Louisiana Proceedings

From 1975 through 1979, Avondale sold to a recycler "salvage oil" consisting of petroleum products and other cargo removed from commercial and U.S. Navy vessels which were cleaned at Avondale's "gas-freeing" plant. The recycler processed the "salvage oil" and resold it to third-parties. The recycler also received "salvage oil" and other material from scores of other sources. It eventually went out of business several years after Avondale had ceased dealing with it.

In early 1986, the Louisiana Department of Justice on behalf of the Louisiana Department of Environmental Quality commenced an administrative proceeding against Avondale and many other parties alleging environmental contamination in connection with the recycler's site. Fourteen judicial proceedings were also commenced against Avondale and scores of other defendants in Louisiana State Court alleging personal injury and property damage. The complaints in those actions sound in strict liability and allege that Avondale and the other defendants were negligent in generating or transporting hazardous waste to the site. Neither the complaints in the private actions nor the administrative proceeding contain allegations as to how any hazardous material was released into the environment.

This Insurance Litigation

Avondale promptly notified Travelers and asked it to defend it in the proceedings in Louisiana. When Travelers had failed to respond to a repeated request, Avondale commenced this declaratory judgment action. Travelers conducted extensive discovery, eventually taking over 40 depositions and receiving responses to multiple waves of interrogatories and document requests. Travelers also filed a third-party complaint against Avondale's insurers for the

periods before and after Avondale had sold the "salvage oil" to the recycler.

Avondale moved for summary judgment requiring Travelers to defend it in the Louisiana proceedings. In opposition to this motion, Travelers argued, among other things, that the "other insurance" clause in its policy relieved it of the duty to defend Avondale. Travelers took no action to resolve its third-party claims against the other four insurers.

In October 1988 the district court ruled that Travelers was obligated to provide Avondale with a defense in the Louisiana proceedings. In its decision the court specifically determined that Travelers "other insurance" argument was without merit. Petition at A-45.[1]

The Rule 54(b) Motion

When Travelers continued to refuse to provide a defense, Avondale moved for entry of a final judgment pursuant to Rule 54(b). Travelers opposed this motion, and argued that its provision of a defense to Avondale should await the resolution of its third-party complaint against the other insurers. It also repeated its arguments that the district court decision was inconsistent with an intermediate level state court decision (now reported as *Technicon Elecs. Corp. v. American Home Assurance Co.*, 141 A.D.2d 124, 533 N.Y.S.2d 91 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989)). In *Technicon*, the losing party had filed a motion for leave to appeal to the highest state court, which motion had not yet been decided. Travelers also argued that any Rule 54(b) certification was premature until the highest state court decided the *Technicon* appeal on the merits.

In December 1988 the district court in a six-page decision carefully reviewed all arguments made by Travelers, determined that the Travelers' duty to defend was "separate and

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1 For the convenience of the Court, our citation to the lower court opinions in this case will be to the Appendices to Travelers' Petition.

distinct" from its duty to indemnify, and also determined that there was no just reason for delay, and ordered the entry of a Rule 54(b) judgment. As to the third-party issue, the court correctly forecast[2] that "there is no immediate prospect of an Order being entered as to Travelers rights (if any) against the third-parties." (Petition at A-28). As to *Technicon*, the district court noted that it had previously distinguished that case (correctly, in the view of the Second Circuit).

The Appeal

Travelers appealed to the Second Circuit. After briefing and argument, the Second Circuit unanimously affirmed the district court on all points. It carefully reviewed the issue of the Rule 54(b) certification, an issue which had been raised again by Travelers on the appeal. By the time the Second Circuit rendered its decision, the New York Court of Appeals had accepted and decided the *Technicon* case in a manner entirely consistent with the district court's analysis. The Second Circuit found that "the New York Court of Appeals affirmance of *Technicon* did nothing to cast doubt on the district court's conclusion." (Petition at A-18).

Travelers moved for rehearing, and filed a suggestion of rehearing en banc. The motion for rehearing was denied, and no active judge requested a vote on the suggestion of a rehearing en banc. Three of those active judges were formerly New York State court judges and five other active judges practiced law in New York state. In its per curiam opinion denying the petition for rehearing, the Second Circuit modified one sentence in its prior opinion to reflect a ruling of the New York Court of Appeals in another decision (not *Technicon*) handed down subsequent to the Second Circuit's first opinion. That state court decision and the modification of the sentence in the Second Circuit's opinion had no effect on the holding in this case.

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2 Even as of the present time, Travelers has made no effort to secure relief on its third-party claims.

SUMMARY OF ARGUMENT

This is no conflict among the circuits, either explicit or implicit. In fact, there is harmony in analysis and result, and the circuits frequently cite one another in their discussion of the legal principles governing Rule 54(b).

This case does not call for the exercise of this Court's power of supervision to correct any departure from the accepted and usual course of judicial proceedings. This Court has amply explicated the standards to be applied, and the lower courts here have carefully applied those standards. Moreover, this Court has expressly ruled that there is no need for hard and fast rules to govern the lower courts.

Travelers' reasons for certiorari are unpersuasive. The lower courts do not need any additional "practical guidelines." Avondale's claim to a defense is separate from Travelers unprosecuted third-party claims for contribution and indemnity. The lower courts did not "preempt the decisions of state courts." The district court was not required to deny Avondale its defense pending the appeal of a case which the district court had already determined (correctly, according to the Second Circuit) was distinguishable. Underlying Travelers strained arguments that the courts below did not follow correct Rule 54(b) procedures is its contention that those courts decided state law issues incorrectly to reach a result with which Travelers does not agree. This Court is properly reluctant to grant certiorari to review state law insurance decisions.

ARGUMENT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS

Rule 10 of this Court's rules provide that one of the considerations governing the granting of a petition for a writ of certiorari is, "[w]hen a United States court of appeals has rendered a decision in conflict with another United States court of appeals . . ." The presence of even a square conflict on a seemingly important issue is not necessarily sufficient to bring about a grant of certiorari. *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting). There must be a "real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Stern, Gressman & Shapiro, *Supreme Court Practice*, § 4.3 (6th ed. 1986)

In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) this Court declared that,

> it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeal.

(Our emphasis.)

A. There Is No Express Conflict Among The Circuits

The Second Circuit in this case did not find itself in conflict with any other circuit. The Petition nowhere cites any circuit court opinion which states that it is in conflict with another circuit on Rule 54(b) issues. We have also been unable to find such a case. No circuit has stated that it is in conflict with any other circuit.

The Petition nowhere cites any other authority, including lower court decisions, treatises, or law review articles which has identified any conflict among the circuits on the Rule

54(b) issues. Similarly, we have been unable to find any such authority. There is no express conflict among the circuits.

B. There Is No Implicit Conflict Among The Circuits

There is no evidence of any implicit conflict among the circuits. Petitioner cites no case in which one circuit distinguishes or questions a case in another circuit.

Petitioner suggests that the Second Circuit's "*failure to address* the interlocutory character of the order" conflicts with *American Motorists Ins. Co. v. Levolor Lorentzen, Inc.*, 879 F.2d 1165 (3d Cir. 1989). (Petition at 22). The lower courts here *did* consider that issue and concluded that the order was *not* interlocutory. (Petition at A-24-25). The Third Circuit found the order in *Levolor* not final because in the same decision in which the district court granted Rule 54(b) certification, it allowed the defendant to take discovery on the certified issue. In this case, the district court made no suggestion whatsoever that its judgment was subject to revision. Massive discovery had already taken place, and was closed by court order.

The Third Circuit in *Levolor* gave no indication that it was in conflict with any Second Circuit rule. The Second Circuit, aware of, and citing, the Third Circuit decision dismissing the appeal (Petition A-21), did not consider itself in any way to be in conflict with the Third Circuit.

The other authorities which Travelers cites to support its contention that there is a conflict (Petition at 13-14) are all cases which can be explained on the basis of the different fact patterns involved, as this Court recognized would often be the case. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8-11 (1980). For example, in *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 966 (9th Cir. 1981) the court found that "[t]he claims disposed of by the Rule 54(b) judgment were inseverable, both legally and factually, from the claims that remained unadjudicated in the district court." In another case cited by Travelers, *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 at n.3 (1st Cir. 1988) the First Cir-

cuit observed that, "the integers which comprise this calculus [Rule 54(b) ana'ysis] will vary from case to case . . . ." Travelers' insistence on rigid rules is contrary to this Court's philosophy of flexibility in applying Rule 54(b). *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956).

C. There Is Harmony Among The Circuits

Not only is there no conflict among the circuits, there is a surprising amount of uniformity in result for an area of the law in which considerations of judicial discretion play such a large role. For example, the circuits routinely cite cases from other circuits in their examination of Rule 54(b) certifications: *Automatic Liquid Packaging, Inc. v. Dominik*, 852 F.2d 1036, 1037 (7th Cir. 1988) citing *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973) and *Rieser v. Baltimore & Ohio R.R.*, 224 F.2d 198 (2d Cir. 1955); *Minority Pol. Off. Ass'n v. City of South Bend, Ind.*, 721 F.2d 197, 200 (7th Cir. 1983) citing *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973); *U.S. Golf Ass'n v. St. Andrews Systems, Data-Max, Inc.*, 749 F.2d 1028, 1031 (3d Cir. 1984) citing *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962 (9th Cir. 1981); *Allegheny County Sanitary Authority v. U.S. E.P.A.*, 732 F.2d 1167, 1172 (3d Cir. 1984) citing *Page v. Preisser*, 585 F.2d 336 (8th Cir. 1978) and *Matter of Bassak*, 705 F.2d 234 (7th Cir. 1983); *Monmouth Medical Center v. Harris*, 646 F.2d 74, 78 (3d Cir. 1981) citing *Elfenbein v. Gulf & Western Indus., Inc.*, 590 F.2d 445 (2d Cir. 1978); *Continental Airlines Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) citing *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065 (7th Cir. 1981); *H & W Industries v. Formosa Plastics Corp., U.S.A.*, 860 F.2d 172, 176 (5th Cir. 1988) citing *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987) and *Gas-A-Car, Inc. v. American Petrofina, Inc.*, 484 F.2d 1102 (10th Cir. 1973); *United States v. O'Neil*, 709 F.2d 361, 369 (5th Cir. 1983) citing *Johnston v. Cartwright*, 344 F.2d 773 (8th Cir. 1965).

II. THE COURTS BELOW DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Rule 10 of the rules of this Court provides that one consideration militating in favor of granting certiorari is "[w]hen a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Travelers makes no showing that any such dereliction occurred in this case.

A. The Lower Courts Followed The Guidance Of This Court

The procedures to be followed by the lower courts in entering Rule 54(b) judgments have been set out in a series of five decisions of this Court starting in 1956.[3] The district court must first determine that there is a final judgment. "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.' " *Curtiss-Wright*, 446 U.S. at 7 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). "Once having found finality, the district court must go on to determine whether there is any just reason for delay . . . The function of the district court under the Rule is to act as a 'dispatcher' [citation omitted] . . . It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright*, 446 U.S. at 8.

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3 *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980); *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980).

In this case, both lower courts carefully followed those guidelines. The district court considered the full range of factors necessary to enter a Rule 54(b) judgment. It was "cognizant of the goals of judicial economy and the policy against 'piecemeal appeals,' " and that "a court should not enter final judgment dismissing a given claim unless that claim is 'separable from the claims that survive.' " District Court opinion, (petition at A-24), citing *United States v. McDonald*, 435 U.S. 850, 852 (1977); *Sears*, 351 U.S. at 438; *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987).

The court of appeals gave plenary review to the separability of claims issue and analyzed the determination of the district court as to just cause for delay on an abuse of discretion standard. Petition A-13.

B. Additional Explication Of Rule 54(b) By This Court Is Unnecessary

With the overall procedures to be followed under Rule 54(b) carefully set out by this Court in five decisions, it becomes a matter of applying those rules to specific circumstances on a case-by-case basis. Because of the latitude recognized to be necessary by this Court in the making of the separate claim determination, (*Curtiss-Wright*, 446 U.S. at 8) and the broad discretion allowed on the "no just reason for delay" prong of the analysis (*Id.* at 10), it would be difficult, if not impossible, to frame additional refinements of the procedures already explicated by this Court.

This Court has determined that there is no need for hard and fast rules in this area of the law. The Court is "reluctant either to fix or sanction narrow guidelines for the district court to follow." *Curtiss-Wright*, 446 U.S. at 11. This Court has recognized a "demonstrated need for flexibility," in Rule 54(b) determinations. *Sears*, 351 U.S. at 435.

C. Judge Posner's Views In *Minority Police Officers* Do Not Require The Overruling Of *Sears* And *Cold Metal*

Petitioner has cited one appellate decision which suggests that this Court "may" need to review its Rule 54(b) holdings. *Minority Pol. Off. Ass'n v. City of South Bend, Ind.*, 721 F.2d 197, 201 (1983).[4] Although Judge Posner suggests that the Rule 54(b) decisions of this Court "may be ripe for reexamination," he concluded that there is no evidence that this Court would overrule those decisions. *Id.* at 201. We submit that Judge Posner was correct in that conclusion. In fact, Judge Posner demonstrated the wisdom of this Court's flexible approach to Rule 54(b) by finding that "it is open to us" to achieve the results he desired (without overruling *Sears* and *Cold Metal*). *Id.*

D. The Courts Of Appeal Are Not Overburdened With Rule 54(b) Appeals

We do not believe that there is any evidence that the circuits are overburdened with Rule 54(b) appeals. For the Second Circuit, which Petitioner asserts is "at one extreme" of permissiveness under Rule 54(b), we were able to locate[5], for the year 1988, only seven reported 54(b) appeals.[6] Reported

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4 The *Minority Pol.* court's belief that Rule 54(b) "may" be ripe for examination was not based on a perceived conflict between circuits—the court even cited the Second Circuit case *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66 (2d Cir. 1973) as authority for its own 54(b) views.

5 Our survey was necessarily limited to reported decisions. We recognize there may be 54(b) appeals disposed of without a reported opinion.

6 *Burr by Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988) (54(b) certification held improvidently granted as to one issue); *Retail Software Services, Inc. v. Lashlee*, 854 F.2d 18 (2d Cir. 1988); *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988); *National Bank of Washington v. Dolgov*, 853 F.2d 57, 58 (2d Cir. 1988) (appeal dismissed because no 54(b) explanation and "closely related issues remained to be litigated"); *Perez v. Ortiz*, 849 F.2d 793 (2d Cir. 1988); *Oliveri v. Delta S.S. Lines*,

54(b) appeals in other years, are, similarly, few in number: 1987–eight reported cases[7]; 1986–five reported cases[8]; 1985–five reported cases[9].

III. TRAVELERS "REASONS FOR GRANTING THE WRIT" ARE UNPERSUASIVE

Travelers advances two arguments for granting certiorari (Petition at 12), neither of which appears to be derived from Rule 10 of this Court.

A. The Lower Courts Do Not Need "Practical Guidelines"

Travelers' first reason is "to provide the lower courts with practical guidelines for determining when a partial final judgment may be entered on one claim in an action involving multiple claims and parties . . . ." (Petition at 12). As we have shown above, this Court has eschewed that approach,

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Inc., 849 F.2d 742 (2d Cir. 1988); *Al Tech Specialty Steel Corp. v. U.S. E.P.A.*, 846 F.2d 158 (2d Cir. 1988).

7 *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Fromer v. Scully*, 817 F.2d 227 (2d Cir. 1987); *In re Agent Orange Product Liability Litigation MDL No. 381*, 818 F.2d 179 (2d Cir. 1987); *Arkin v. Trans. Intern. Airlines, Inc.*, 815 F.2d 12 (2d Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698 (2d Cir. 1987); *Akerman v. Oryx Communications, Inc.*, 810 F.2d 336 (2d Cir. 1987) (Rule 54(b) appeal dismissed for lack of finality); *Coffee v. Cutter Biological*, 809 F.2d 191 (2d Cir. 1987).

8 *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *BASF Wyandotte Corp. v. Local 227, Intern. Chemical Workers Union, AFL-CIO*, 791 F.2d 1046 (2d Cir. 1986); *Hollander v. Brezenoff*, 787 F.2d 834 (2d Cir. 1986); *Ellis Nat. Bank of Jacksonville v. Irving Trust Co.*, 786 F.2d 466 (2d Cir. 1986); *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986).

9 *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985); *Ansam Associates, Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442 (2d Cir. 1985); *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57 (2d Cir. 1985).

saying "we are reluctant either to fix or sanction narrow guidelines for the district courts to follow." *Curtiss-Wright*, 446 U.S. at 10-11.

Avondale's claim to a defense is separate from Travelers unprosecuted third-party claims for contribution and indemnity and is final. In fact, the third-party complaint *assumes*, as a third-party complaint must (Fed. R. Civ. P. 14(a)), the liability of Travelers. The existence of third-party complaints can not as a matter of law preclude the entry of a Rule 54(b) judgment on the main claim. The two types of claims are specifically listed in the Rule itself as types of claims as to which a rule 54(b) judgment can be entered.

That the third-party complaints raise significant issues of fact and law unrelated to Travelers' duty to defend is shown by the fact that Travelers has taken no action to resolve those claims, as it would surely have done if the issues were similar to those raised by Avondale's motion for partial summary judgment. Ironically, if Travelers position in this regard is adopted then *it* would usurp the role of "dispatcher" which this Court has held properly belongs to the district court. *Sears*, 351 U.S. at 435. This is because finality as to Avondale's claim for a defense, in Travelers view, depends on when, if ever, Travelers sees fit to pursue its third-party claims.

B. The Lower Courts Did Not Preempt State Court Decisions

Travelers second reason for certiorari is "to enforce the institutional limits on the discretion of a federal court sitting in diversity to use Rule 54(b) to preempt the decisions of state courts construing state law." Nothing in the decisions below in any way preempts state courts from construing state law. The gist of this argument is that Travelers does not agree with the way the courts below decided state law.

A reading of the lower court decisions will demonstrate not only that the lower courts were correct (not one of the fourteen judges in the courts below who considered Travelers

arguments found any merit in them), but also that the lower courts carefully considered all the state law precedents, even to the extent, in the case of the Second Circuit, of modifying its opinion to reflect a state court decision handed down a month after its first opinion.

C. This Court Is Reluctant To Review State Law Insurance Issues

Even if Travelers had demonstrated that the lower courts decided issues of state law incorrectly, that would not be a sufficient basis for the grant of certiorari.

As noted in Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4036 at 41 (1988),

> [T]he Court practices severe restraint in reviewing questions of state law. Thus until 1980, the Court's Rules stated that one reason for granting certiorari would be that a court of appeals had decided an important state or territorial question in a way in conflict with applicable state or territorial law. Even then, review was seldom granted to consider such questions. The new Rules omit the former provision, and the Court has since stated that ordinarily it will not grant certiorari simply to review questions of state or District of Columbia law. [footnotes omitted]

This Court "rarely reviews a construction of state law agreed upon by the two lower federal courts." *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals"); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) ("In dealing with issues of state law . . . we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable" quoting *Propper v. Clark*, 337 U.S. 472, 486-87 (1949)); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967)

(Court does not "ordinarily review the holding of a court of appeals on a matter of state law"); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

The application of that rule is particularly apt in this case because the author of the circuit court opinion, interpreting New York state law, Judge Cardamone, served for 18 years as a New York state court judge. Federal Bar Council, *Second Circuit Redbook-1989-1990*, 53 (1989).

This Court has consistently denied *certiorari* in insurance coverage disputes governed by state law. E.g. *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 940 (1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D. C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1009 (1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

Certiorari has even been denied where the attorney general of a state has asserted that the lower federal courts have incorrectly determined the law of his state. Petition for Certiorari on behalf of State of Missouri (p.29) in *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) *cert. denied*, 109 S. Ct. 66 (1988).

CONCLUSION

For all the foregoing reasons, Avondale respectfully requests that this Court deny Travelers petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 10, 1990

Respectfully submitted,

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